Criminal Division

CHRISTOPHER A. WRAY
ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

TESTIMONY

SENTENCING POLICY AFTER BOOKER AND FANFAN
BEFORE THE
UNITED STATES SENTENCING COMMISSION

THURGOOD MARSHALL FEDERAL JUDICIAL BUILDING
WASHINGTON, D.C.
NOVEMBER 17, 2004

INTRODUCTION

Mr. Chairman, members of the Commission, distinguished guests-

On behalf of the entire Department of Justice, I want to thank the Commission for holding this important hearing, and for giving the Department and other interested parties a forum to discuss with you the future of federal criminal sentencing. There is no more important subject for the federal criminal justice family and for federal crime policy than what we are here today to discuss. In the almost five months since the Supreme Court's decision in Blakely v. Washington, 124 S. Ct. 2531 (2004) an unprecedented level of uncertainty has taken hold in the federal criminal justice system. This uncertainty has already led to serious consequences in both individual cases and on the enforcement of federal law in general. Moreover, there is, looming, the potential for even greater and more devastating consequences. It is critical that in the weeks and months to come that the Commission and the Department work closely together and with the federal Judiciary, the Congress, and interested groups to ensure that federal sentencing policy is crafted both to comply with the requirements of the Constitution and to embody the values of the Sentencing Reform Act.

THE FEDERAL SENTENCING REFORM EFFORT

In the wake of Blakely and in anticipation of the Court's decision in Booker and Fanfan, the Department has worked hard to consider various ways to address the concerns raised by a majority of the Court in Blakely. In this work, we are guided by one fundamental fact: that sentencing reform has been a success both in reducing unwarranted disparities in sentencing and in reducing crime. I think it is important, before we discuss options for addressing the concerns underlying Blakely, to first consider once again the Sentencing Reform Act -- the reasons for its development and implementation, and the many ways in which it has been successful.

It was just over twenty years ago, after more than a decade of bipartisan efforts, that the 98th Congress passed the Sentencing Reform Act of 1984, creating the United States Sentencing Commission. Under its mandate, the

Commission established sentencing policies and practices to avoid unwarranted disparity and to achieve the purposes of sentencing: punishment, deterrence, incapacitation and rehabilitation. The Commission created guidelines, accomplishing this monumental task in only 18 months, and the guidelines took effect in November 1987. Two years later, and with only a single Justice in dissent, the Supreme Court upheld the guidelines against multiple constitutional challenges in Mistretta v. United States, 488 U.S. 361 (1989). By all quantifiable measurements, the resulting sentencing reform has been successful.

The guiding principle behind the Sentencing Reform Act was truth and transparency in sentencing and the similar treatment of defendants with similar criminal records who committed similar criminal conduct. The system of sentencing guidelines created by the Commission is structured and tough. The structure provides fairness, predictability, and appropriate uniformity. In addition, the guidelines structure allows for targeting longer sentences to especially dangerous or recidivist criminals. In 2002, over 63,000 convicted defendants were sentenced in federal courts under the sentencing guidelines. And because the guidelines sentences in those cases did not depend on the district where the offense was committed or the judge who imposed the sentence, the guidelines minimized the probability that similarly-situated defendants were subject to unwarranted disparity in punishment.

Instead, for the last seventeen years, defendants have been subject to guidelines that are the result of a process of collaboration between the Commission and all major stakeholders in the federal criminal justice system, interested observers, and the general public. Through the years, the Commission has worked with not only the Department of Justice, but also the Judicial Conference's Committee on Criminal Law, and advisory groups with expertise on all types of crimes. This constant collaboration has ensured that the guidelines are fair and are perceived as legitimate and credible. In the last fifteen years, there has been healthy debate over specific details of the guidelines, but there has also been a genuine consensus in support of the Act and around the principles of sentencing reform and determinate sentencing. Regardless of how the pending litigation turns out, we are committed to these principles of sentencing reform because they embody the promise of both

fairness and crime control. We can ask no more and no less of our criminal justice system.

THE IMPACT OF SENTENCING REFORM

It is also important to reflect on how much progress has been made as a result of the efforts of sentencing reform. The United States is experiencing a 30-year low in crime. Nearly 35 million violent crimes were not committed in the last decade because of this reduction in crime. According to the Bureau of Justice Statistics ("BJS"), in 2003, the public experienced 5.4 million violent victimizations.[1] By contrast, had the per-capita rates of 1993 occurred in 2003, we would have suffered nearly 12 million violent acts of murder, robbery, sexual assault, and assault. If, in 2003, the murder rate had been the same as in 1993, the U.S. would have experienced 27,700 murders; however, 2003 statistics show there were an estimated 16,503 murders during the year – a decrease of about 11,200 murders. Looking at the same ten-year period (1994 and 2003), reduced crime rates resulted in nearly 107 million fewer property crimes taking place.[2] Looking at these numbers, it is hard to accept the claim of some that society is misspending its resources on longer prison sentences.

Among the principal reasons that the United States is experiencing such low crime rates today are the effects of tougher determinate sentences and the elimination of parole that the 1984 federal sentencing reforms reflect and that many states have also adopted. The key elements of such reform were overall consistency in sentencing, truth-in-sentencing, limited judicial discretion, and mandatory minimum sentences. The new sentencing systems adopted in many states and in the federal system recognized the need to place the public's safety from crime first, and to further that end through adequate deterrence, incapacitation of violent offenders, and just punishment.

---

[1] Criminal Victimization, 2003, BJS (NCJ 205455), September 2004.

[2] Lawrence A. Greenfeld, Director, Bureau of Justice Statistics, Address at the BJS/JRSA Conference (October 2, 2003 and updated with data for 2003) [hereinafter Greenfeld Address]. These statistics are derived from annual data from the National Crime Victimization Survey, which is then applied to the general population aged 12 or older. Crime data are derived from http://www.ojp.usdoj.gov/bjs/glance/tables/viortrdtab.htm and annual population estimates provided in the BJS annual report "Criminal Victimization in the United States."

The FBI just recently announced that violent crime in the United States decreased by another 3% from 2002 to 2003, adding to an overall drop in the violent crime rate of 26% in the last decade. These statistics confirm and underscore the historic drop in violent crime and other serious offenses that began in the early 1990's, shortly after the Sentencing Reform Act took effect, and continuing when truth-in-sentencing grants were made available to states. The bottom line is that fewer Americans are now being victimized by crime as a result of effective sentencing laws. A basic lesson that we have learned – the more offenders who are deterred and incapacitated, the fewer people who are victims of crime.

Critics tell you that our current sentencing system is a failure and that our prisons are filled with non-violent first-time offenders. But the statistics do not support such claims. BJS statistics show that more than 90% of prison inmates had a criminal record prior to their current imprisonment or were in prison for a violent crime. Focusing exclusively on the federal prison population, approximately two-thirds of all federal prisoners are in prison for violent crimes or had a prior criminal record before being incarcerated. Looking exclusively at the non-violent prisoners, a recent BJS study concluded that an estimated 80% of non-violent offenders released from prison had prior criminal history records that, on average, reflected 9.3 prior arrests and 4.1 prior convictions.[3] In addition, about a third of these prisoners had a history of arrests for violent crimes. The claim that our prisons are filled with nonviolent, first-time offenders is therefore not true. Given the active criminal careers and the propensity for recidivism of most prisoners, incapacitation works and people are safer for it. History teaches us that tough sentencing produces less crime and so we should be mindful of this as we evaluate the various alternatives to the current sentencing guidelines.

---

[3] BJS, Profile of Nonviolent Offenders Exiting State Prisons, October, 2004, at <<http://www.ojp.usdoj.gov/bjs/pub/pdf/pnoesp.pdf>.

THE BLAKELY DECISION AND ITS IMMEDIATE AFTERMATH

Five months ago, at the end of its last term, the Supreme Court in Blakely v. Washington, invalidated some of the procedures of the Washington State sentencing guidelines, thus, casting doubt onto the procedures used in other states and in federal sentencing. That decision caused a significant upheaval in the federal criminal justice system. Some courts invalidated the guidelines altogether or severed them, applying the remainder in ways never contemplated by Congress or the Commission. In many cases where courts have applied Blakely to the federal guidelines, the result has been a distortion of the principles of sentencing reform. Judges around the country have differed widely in their interpretation of how Blakely might apply to the guidelines, resulting in the disparate sentences that the Sentencing Reform Act was created to avoid. Some cases, such as one in West Virginia and another here in Washington D.C., were highly publicized. In other less publicized cases, courts around the country have handed down sentences that have also violated the letter and spirit of the guidelines. As a protective measure, federal prosecutors began to include in indictments all readily provable guidelines upward adjustment or upward departure factors. We hope and foresee that these measures will help ensure that most sentences handed down during this uncertain time will be upheld.

In United States v. Booker and United States v. Fanfan, the Department, and the Commission through an amicus brief, argued that the federal sentencing guidelines system is significantly distinguishable from the Washington state guidelines system at issue in Blakely, and that the design of Congress and the United States Sentencing Commission for arriving at federal sentences and utilized in hundreds of thousands of cases over the past 15 years meets all constitutional requirements. We now await the Supreme Court's decision.

Regardless of the outcome of the Booker and Fanfan cases, the Department is confident that working together with the Sentencing Commission, we will succeed in maintaining a sentencing system that upholds the principles of sentencing reform: truth in sentencing, proportionality, and the reduction of unwarranted disparity. Any necessary

policy steps following the decision in Booker and Fanfan – legislative or otherwise – must embody these principles and conform to all constitutional requirements articulated by the Court.

ALTERNATIVES

Ever since Blakely was decided, the Department has been preparing for the possibility that the sentencing guidelines may have to be substantially changed in order to comply with the Supreme Court's holding regarding their constitutionality. We have consulted within the Department, with U.S. Attorney's Offices around the country, and with other branches of government, in order to consider and to evaluate carefully all of the various options which have been proposed.

One such option is what is being referred to as the "Blakely-ization" of the guidelines. Under this proposal, Blakely procedures such as jury determination and proof beyond a reasonable doubt would be applied to the current guidelines or to a simplified version of the guidelines. This proposal has significant barriers and radically alters the role of judges and juries. For over 200 years the law and practice in this country has been that juries determine guilt and judges determine what sentence a defendant deserves. Indeed, juries have been instructed that they are not even to consider penalties. Under a Blakely-ized system, the traditional role of judges in sentencing would be substantially diminished.

Further, the procedural issues involved in including juries in the sentencing phase would be very complex. There are a number of barriers to implementation, such as the decision of what rules of law and procedure would apply, how to instruct the jury, and how to conduct the sentencing phase in multi-defendant cases. Certain factors are inappropriate for juries to consider, others would be lost altogether, while others would significantly extend the length of the trial. These procedures would impose significant burdens on every phase of the criminal justice system – burdens that are not constitutionally required and are no more likely to result in fair and consistent sentences.

Last, but not least, this proposal raises the constitutional question – addressed in Mistretta – of whether the Commission, rather than Congress, can promulgate sentencing factors that appear indistinguishable from elements in that they define crimes and set penalties, rather than channel the court's discretion within the statutory limits set by Congress.

A second option is to make the sentencing guidelines advisory. Courts would use the guidelines on a voluntary basis to determine a sentence between the statutory minimum and maximum. Although unquestionably constitutional and easy to implement, the option goes against the principles of the Sentencing Reform Act. Congress explicitly chose against making the guidelines advisory because compliance with advisory guidelines would be inconsistent. Sentences would once again lack predictability and transparency, and disparity would no doubt increase.

A third option is for Congress to create additional mandatory minium sentences, an option that would require significant legislative action.

Under another proposal, the guidelines minimum would remain the same as is the case under the current guidelines, but the maximum would be the statutory maximum as set by Congress. This would make clear that a defendant is always subject to the maximum statutory penalty defined by Congress based upon the jury verdict alone. The sentencing guidelines would still work in the same manner they have for 20 years – identifying aggravating and mitigating factors that will be determined by a judge and that will help cabin judicial discretion to bring a more certain, consistent and just result.

While we do not endorse this or any proposal at this time, there appear to be many advantages to the proposal. This system would preserve the traditional roles of judges and juries in criminal cases. It would retain the role of the Sentencing Commission. It would be relatively easy to legislate, easy in practice, the results would replicate the current guidelines, and it would fulfill the important sentencing policies embodied in the Sentencing Reform Act. We do not believe that a new enlarged sentencing range will result in more severe sentences, as data from the Sentencing Commission

show that under the current sentencing system, 99.2% of sentences imposed are within or below the sentencing range. Only 0.8% of sentences imposed are above the sentencing range. This is strong evidence that judges are not likely to sentence outside of the current ranges. Under this proposal, advisory maximum sentences would be issued as part of the guidelines manual, which would give district and circuit courts across the country the benefit of the Commission's collective wisdom and statistical analysis regarding sentencing and would provide a suggested, though not legally mandated, maximum sentence similar to the current maximum. In addition, the Department would be free to issue an internal policy to require prosecutors to recommend a sentence within a certain range in the ordinary case.

Some, including the Practitioner's Advisory Group, have expressed concerns about the constitutionality of this proposal, as it can survive only as long as the Supreme Court declines to extend the rule in Blakely to findings necessary to enhance a mandatory minimum sentence. We acknowledge that the proposal relies on the Supreme Court's holdings in McMillan[4] and Harris,[5] which held that judges, rather than juries, can sentence defendants based upon facts as long as these facts do not increase the maximum sentence a defendant faces. Thus, courts may determine mandatory minimum sentences as long as that sentence does not increase the sentence based upon the jury verdict alone. Yet there is no reason to believe that these cases have been weakened. Although Harris was a plurality opinion, it was issued only two years ago, following Apprendi[6], which the Court explicitly found did not apply. And while Blakely has redefined what is the "maximum sentence" faced by a defendant, it has not undermined the concept that courts can find facts that determine mandatory sentences *within* the maximum sentence. This proposal appears to address the Court's concern and complies with Blakely, if the Court applies its rule to the federal guidelines, by allowing only judicial fact finding within the guideline range. We believe that the constitutionality of any proposal ought to be measured through the context of *stare decisis*. Unless the Supreme Court states otherwise, *stare decisis* should be our guiding principle, especially when "overruling [a] decision would dislodge

---

[4] McMillan v. Pennsylvania, 477 U.S. 79 (1986)

[5] Harris v. United States, 536 U.S. 545 (2002)

[6] Apprendi v. New Jersey, 530 U.S. 466 (2000)

settled rights and expectations or require an extensive legislative response."[7] Of all the legislative proposals being discussed as possible solutions, this option adheres most closely to the principles of sentencing reform, such as truth-in-sentencing, certainty and fairness in sentencing, and the elimination of unwarranted sentencing disparities.

CONCLUSION

The Department of Justice is committed to ensuring that the federal criminal justice system continues to impose just and appropriate sentences that serve the same policies embodied in the Sentencing Reform Act. As we have for the last twenty years, we look forward to working with the Commission to ensure that federal sentencing policy continues to play its vital role in bringing justice to the communities of this country.

---

[7] See, Hubbard v. United States, 514 U.S. 695, 716 (1995)